

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROLANDO HERNANDEZ,

Plaintiff,

v.

CITY OF VANCOUVER and MARK
TANNINEN,

Defendant.

Case No. C04-5539 FDB

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the Court on Defendants' Motion for Summary Judgment seeking dismissal of Plaintiff's claims for employment discrimination. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants the motion of the City of Vancouver and Mark Tanninen and dismisses Plaintiff's case for the reasons described below.

INTRODUCTION AND BACKGROUND

Plaintiff Rolando Hernandez is a Hispanic male employed as a mechanic by the City of Vancouver. Plaintiff has been employed by the City for over ten years and continues to work for the City. Hernandez was hired in 1995 to work in the Operations Center as a mechanic. In 1999,

1 Hernandez applied for and received a transfer from the Operations Center to the Fire Shop to work as
2 an Emergency Equipment Mechanic (EEM). The qualifications for an EEM are higher and include
3 three years of journey level experience, as well as additional certifications beyond those required of an
4 operations Shop mechanic. The Fire Shop only repairs emergency vehicles. The expectations are
5 higher and the need for perfection is magnified as emergency vehicles must be in optimal working
6 condition. Because of these factors, the EEM's earn nearly 18% more in wages than Operations
7 Center mechanics.

8 Plaintiff acknowledged receipt of and agreed to familiarize himself with the employment
9 policies of the City of Vancouver. These policies include an anti-harassment policy which forbids
10 racial harassment, sets forth a complaint procedure and prohibits retaliation.

11 Plaintiff's complaint alleges that he received the "cold shoulder" from the first day he began
12 work in the Fire Shop. Plaintiff cannot, however, recall any specific incidents when his co-workers
13 refused his requests for assistance. Hernandez also contends he was assigned demeaning jobs because
14 he was put on more physical tasks, such as changing springs and because he was assigned a lot of oil
15 changes. Plaintiff, however, admits that all mechanics except one were changing springs and he is
16 unaware how often others were changing springs or performing oil changes. Plaintiff also notes that
17 two or three co-workers have specialties that require a lot of their time.¹

18 Plaintiff alleges that his work and tools were sabotaged. These alleged incidents of sabotage
19 were investigated by the City and no evidence found that his tools or work were intentionally
20 damaged. When Plaintiff's drill was damaged, his supervisor immediately offered to have the drill
21 repaired and the City provided a replacement drill at no cost to Plaintiff. Concerning his work,

22
23 ¹Plaintiff has filed an affidavit in opposition to the motion for summary judgment which
24 attempts to clarify his deposition testimony. Plaintiff cannot create an issue of fact by submitting an
25 affidavit that contradicts his prior deposition testimony. See Foster v. Arcata Assocs., 772 F.2d
26 1453, 1462 (9th Cir.1985) and Radobenko v. Automated Equip. Corp., 520 F.2d 540, 543-44 (9th
Cir.1975).

1 Hernandez alleges sabotage in that a vehicle he had worked on was discovered to have broken lug
2 nuts, an oil leak due to a loose oil pan plug, a coolant leak due to a loose radiator cap, a fuel leak due
3 to a missing fuel filter clip and an oil leak because of multiple gaskets on the filter. Plaintiff has
4 offered no evidence that these problems were a result of the actions of others, rather than his own
5 errors. He received no discipline or counseling for any of these incidents.

6 Plaintiff also alleges that he was not allowed to check his email on company time while others
7 were. However, all mechanics were counseled for spending too much time on personal email.
8 Plaintiff also complains about vacation time requests. However, he acknowledges that there were
9 certain periods of time where work was heavier and required more of the shop personnel to be on
10 duty.

11 In June of 2002, Hernandez had a meeting with his supervisor and a member of the City's
12 Human Resources Department concerning incidents in which plaintiff made errors in repairing
13 emergency vehicles. Plaintiff was provided a document outlining four incidents that were considered
14 serious and that compromised the Fire Shop's ability to provide regular and responsive services.
15 Plaintiff admitted to the mistakes in work performance.

16 In November, 2004 Hernandez received written discipline for two additional errors.
17 Hernandez was given eight hours of suspension without pay as well as a written reprimand. The
18 discipline notice provided that Plaintiff needed to improve on accuracy and thoroughness of his work.
19 Plaintiff was put on notice that his performance would be reviewed in sixty days and that his failure to
20 immediately improve, and sustain improvement, would lead to further disciplinary action, which
21 would most likely include termination of employment.

22 A month later, in December, 2004, Plaintiff and a co-worker had an altercation in the parking
23 lot of the Fire Shop. The day after this incident, Plaintiff was put on administrative leave pending a
24 fitness for duty evaluation. Plaintiff explains that after he completed the evaluation he requested a
25 transfer from the Fire Shop to the Operations Center.

1 Hernandez transferred back to the Operations Center pursuant to an “Agreement and
2 Memorandum of Understanding.” The memorandum specifically provides that the City agrees to the
3 request for transfer and that an additional letter of discipline is imposed. The letter of discipline states
4 that Plaintiff had failed to improve his accuracy and thoroughness as required by his performance
5 evaluation and had engaged in a verbal exchange with a co-worker in which he used profane language
6 and hand gestures.

7 Hernandez asserts that his supervisor, Defendant Mark Tanninen initially confirmed Plaintiff’s
8 allegations of discrimination and after consulting with City personnel, refused to cooperate with
9 Plaintiff’s counsel.² However, Mark Tanninen’s testimony does not support these allegations.

10 Hernandez filed a charge of discrimination with the Equal Employment Opportunity
11 Commission (EEOC) claiming discrimination based on national origin. The charge asserts that during
12 his employment, Hernandez was subjected to a hostile work environment. Co-workers ostracized
13 Hernandez, his tools were damaged and he was subject to unwarranted discipline. Hernandez
14 contended that these actions were based on his national origin in violation of Title VII of the Civil
15 Rights Act of 1964. The EEOC investigated the charge and issued its Notice of Right to Sue.

16 Plaintiff served a tort claim notice to the City of Vancouver and subsequently commenced this
17 action. Plaintiff asserts claims for employment discrimination, retaliation and hostile work
18 environment under 42 U.S.C. § 2000 (Title VII), 42 U.S.C. §1981, 42 U.S.C. § 1983, 42 U.S.C.
19 §1985 and Washington Law Against Discrimination State, RCW 49.60.

20 SUMMARY JUDGMENT STANDARD

21 Summary judgment is appropriate where there is no genuine issue of material fact and the

22
23 ²Attorney Gregory Ferguson has filed an affidavit which purports to set forth what Mark
24 Tanninen stated to Mr. Ferguson in confirming the allegations of discrimination. This is inadmissible
25 hearsay and will be disregarded. See, Orr v. Bank of America, NT & SA, 285 F.3d 764 (9th Cir. 2002);
26 UA Local 343 v. NorCal Plumbing, Inc., 48 F.3d 1465, 1473 (9th Cir.1995).

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the opposing party must show that there is a genuine issue of material fact for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The opposing party may not rest upon the mere allegations or denials of the moving party's pleading, but must present significant and probative evidence to support its claim. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). For purposes of this motion, reasonable doubts as to the existence of material facts are resolved against the moving party and inferences are drawn in the light most favorable to the opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is mandated where the facts and the law will reasonably support only one conclusion.

RETALIATION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

A prerequisite to subject matter jurisdiction over a federal discrimination claim is exhaustion of administrative remedies. Lyons v. England, 307 F.3d 1092, 1103-04 (9th Cir. 2002); B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002). Exhaustion of administrative remedies requires that the complainant file a timely charge with the EEOC, thereby allowing the agency time to investigate the charge. See, 42 U.S.C. § 2000e-5(b); see also, Lyons, at 1104; B.K.B., at 1099. “Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are like or reasonably related to the allegations contained in the EEOC charge.” Lyons, at 1104; Green v. Los Angeles County Superintendent of Sch., 883 F.2d 1472, 1475-76 (9th Cir. 1989). Plaintiff has failed to exhaust his EEOC remedies in regard to the retaliation claim. The text of the charge simply alleges national origin discrimination based on disparate treatment and

1 hostile work environment. A claim of retaliation is not reasonably related to allegations contained in
 2 the EEOC charge. Plaintiff did not exhaust administrative remedies on his retaliation claim.
 3 Accordingly, this Court lacks jurisdiction over the retaliation claim.

4 **DISPARATE TREATMENT AND RETALIATION**

5 The elements necessary to establish a prima facie case of discrimination or retaliation are the
 6 same under federal and state law. Manatt v. Bank of America, NA, 339 F.3d 792, 797 (9th Cir. 2003)
 7 (plaintiff must meet the same standards in proving a § 1981 claim that he must meet in establishing a
 8 claim under Title VII); Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1112 (9th Cir.
 9 1991).(elements of cause of action under § 1983 are the same as those under Title VII); Hernandez v.
 10 Spacelabs Medical Inc., 343 F.3d 1107, 1112 (9th Cir. 2003); Hill v. BCTI Income Fund-I, 144
 11 Wn.2d 172, 23 P.3d 440, 446 (2001)(Washington has adopted the federal protocol in discrimination
 12 cases brought under state and common law).

13 Motions for summary judgment in cases alleging disparate treatment discrimination are
 14 analyzed under the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411
 15 U.S. 792 (1973). Under that framework, a plaintiff must first establish a prima facie case of
 16 discrimination. The burden of production then shifts to the defendant to show legitimate,
 17 non-discriminatory reasons for defendant's action. The burden then shifts back to the plaintiff to
 18 show that the defendant's reasons were pretextual. Despite this burden shifting, the ultimate burden
 19 of persuading the trier of fact that the employer intentionally discriminated remains at all times with
 20 the plaintiff. Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Norris v. City and County of
 21 San Francisco, 900 F.2d 1326, 1329 (9th Cir. 1990).

22 To make out a prima facie case of disparate treatment, Hernandez must show that: (1) he
 23 belonged to a protected class; (2) he was performing his job in a satisfactory manner; (3) he was
 24 subjected to an adverse employment action; and (4) similarly situated employees not in his protected
 25 class received more favorable treatment. Kang v. U. Lim America, Inc., 296 F.3d 810, 818 (9th Cir.

2002); Chuang v. Univ. of California Davis, 225 F.3d 1115, 1123 (9th Cir. 2000).

It is undisputed that Rolando Hernandez is a member of a protected class; a Hispanic.

Plaintiff has failed to show that he performed his job in a satisfactory manner. In light of the written discipline outlining specific incidents in which Hernandez made serious errors in repairing emergency vehicles, Plaintiff cannot show that he was performing his job in a satisfactory manner.

It also appears that Plaintiff did not suffer an adverse employment action. The employment action was taken at Plaintiff's request for a transfer back to the Operations Center.

A prima facie case of retaliation requires the Plaintiff show that (1) he engaged in protected activity, such as filing of complaint alleging racial discrimination, (2) employer subjected him to adverse employment action, and (3) causal link exists between protected activity and adverse action. Manatt v. Bank of America, NA, 339 F.3d 792, 800 (9th Cir. 2003). Plaintiff has failed to present any evidence that the discipline or transfer has a causal relationship to a protected activity, such as complaints of racial discrimination.

Even were Plaintiff able to make a prima facie case of discrimination, the City has set forth a legitimate, nondiscriminatory reason for the discipline and transfer of Plaintiff. See, Manatt, at 801-02. Plaintiff has provided no evidence that the legitimate explanation was pretextual.

The Defendants are entitled to summary judgment on Plaintiff's disparate treatment discrimination and retaliation claims.

HOSTILE WORK ENVIRONMENT

To establish prima facie hostile work environment claim under either Title VII or § 1981, employee must raise triable issue of fact as to whether (1) he was subjected to verbal or physical conduct because of his national origin, (2) conduct was unwelcome, and (3) conduct was sufficiently severe or pervasive to alter conditions of his employment and create abusive work environment. Manatt v. Bank of America, NA, 339 F.3d 792, 798 (9th Cir. 2003). A hostile work environment exists when the work place is permeated with discriminatory intimidation, ridicule, and insult that is

1 sufficiently severe or pervasive as to alter the condition of the victim's employment and create an
2 abusive working environment. Faragher v. Boca Raton, 524 U.S. 775, 786 (1998). The conduct must
3 be severe or pervasive enough to create an objectively hostile or abusive work environment; an
4 environment a reasonable person in the plaintiff's position would find hostile or abusive considering all
5 the circumstances. Faragher, at 787; Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81
6 (1998); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir.1991). The assessment of whether an
7 environment is objectively hostile "requires careful consideration of the social context in which the
8 particular behavior occurs and is experienced by its target." Oncale, at 81. The victim must perceive
9 the environment as hostile; the conduct must actually alter the conditions of the victim's employment.
10 Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). Whether an environment is hostile or
11 abusive depends on all the circumstances including; the frequency of the discriminatory conduct; it's
12 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and
13 whether it unreasonably interferes with an employee's work performance. Harris, at 23; Clark County
14 School Dist. v. Breeden, 532 U.S. 268, 271 (2001).

15 The Plaintiff's allegations fall short of the severity of conditions that constitute a hostile work
16 environment. See, Vasquez v. County of Los Angeles, 349 F.3d 634 (9th Cir. 2003).

17 The Defendants are entitled to summary judgment dismissing Plaintiff's hostile work
18 environment claim.

19 SECTION 1985 CONSPIRACY

20 Hernandez seeks relief under 42 U.S.C. § 1985 for the same discriminatory and retaliatory
21 acts alleged in his Title VII and § 1983 claims. "[T]he absence of a section 1983 deprivation of rights
22 precludes a section 1985 conspiracy claim predicated on the same allegations.", 866 F.2d 1175, 1182
23 (9th Cir.1989); see also, 824 F.2d 735, 739 (9th Cir.1987).

24 To prove a violation of section of § 1985 which prohibits conspiracies to deprive any person
25 of his or her civil rights, plaintiff must show some racial, or perhaps otherwise class-based, invidiously

1 discriminatory animus behind the conspirators' action; the conspiracy, in other words, must aim at a
2 deprivation of the equal enjoyment of rights secured by the law to all. Orin v. Barclay,
3 272 F.3d 1207, 1217 (9th Cir. 2001). To bring a cause of action successfully under § 1985(3), a
4 plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either
5 directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal
6 privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby
7 a person is either injured in his person or property or deprived of any right or privilege of a citizen of
8 the United States. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992).

9 Plaintiff alleges that City personnel and Mark Tanninen acted in concert to deter or subvert
10 investigations into defendant's actions, to cover up their actions, and to otherwise preclude Plaintiff
11 from pursuing his rights. Plaintiff has produced no evidence in support of these allegations. There is
12 no evidence of conspiracy. There is no evidence of race-based discriminatory animus. Defendants are
13 entitled to summary judgment on Plaintiff's § 1985 conspiracy claim.

14 CONCLUSION


15 For the reasons set forth above, Defendants City of Vancouver and Mark Tanninen are
16 entitled to summary judgment of dismissal of Plaintiff's claims in their entirety.

17 ACCORDINGLY,

18 IT IS ORDERED:

19 Defendants' Motion for Summary Judgment [DKT. #46] is **GRANTED**, and this case
20 dismissed in its entirety.

21 DATED this 24TH day of July, 2006.

22
23 
24 FRANKLIN D. BURGESS
25 UNITED STATES DISTRICT JUDGE
26